Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-157

In The

Supreme Court of the United States

October Term, 1988

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

HENRY GERRARD CLAY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF

Of Counsel:

GEOFFREY C. HAZARD, JR.
Sterling Professor of Law
Yale Law School
New Haven, Conn. 06520
Telephone: (203) 436-8253

*BERT S. NETTLES
FORREST S. LATTA
NETTLES, BARKER, JANECKY & COPELAND, P.C.
3300 First Nat'l Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Attorneys for Petitioner Nationwide Mutual Insurance Company

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

I. The Federal Questions are Timely 1

II. Unconstitutional Punitive Damages Judgment ... 2

III. Judicial Disqualification 3

IV. The Abolished Affirmance Penalty 4

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) ... 1, 3

Aetna Life Ins. Co. v. Lavoie, 470 So.2d 1060 (1984) 4

Browning-Ferris Indus. v. Kelco Disposal, Inc., No. 88-556, *cert. granted*, December 5, 1988 3

Gulf Atlantic Life Ins. Co. v. Barnes, 405 So.2d 916 (Ala. 1981) 1

Hormel v. Helvering, 312 U.S. 552 (1941) 2

REPLY BRIEF

I. THE FEDERAL QUESTIONS ARE TIMELY

Alabama courts can and will address important Constitutional arguments not raised at trial, as respondent admits. Response p. 9. The twelve cases cited by petitioner disclose that Alabama courts will consider such issues where there are unusual or mitigating circumstances. Petition p. 11.

In this case, the federal questions were presented at the first opportunity they arose because, at the time of trial, no grossly excessive punitive damages award had ever been sustained by the Alabama Supreme Court in a bad faith case. Theretofore, the largest bad faith punitive damages verdict sustained on appeal in Alabama was $100,000, which was substantially remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 926 (Ala. 1981).[1]

The possibility of a grossly excessive punitive damages judgment did not arise until the Alabama Supreme Court sustained the $3.5 million judgment in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), which was decided almost contemporaneously with this case.[2] Such an

---

[1] The *Barnes* case involved circumstances of fraud and coverup by the insurer, as well as bad faith nonpayment of the insurance claim.

[2] The affirmance of the $1.25 million verdict in this case followed by three months the affirmance in *Aetna Life Ins. Co. v. Lavoie, supra.* As the petition discusses, the decision of both cases coincided with Justice Eric Embry's own bad faith suit, which obviously could not have been anticipated.

unprecedented change in remittitur standards could not have been anticipated.

Furthermore, the "not raised below" rule exists so that litigants "may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). No such impediment exists here, because the constitutional issues raised by petitioner are not dependent on any further development of facts. Hence, no purpose is served by rigid application of the "not raised below" rule, where the questions were fully briefed in the Alabama Supreme Court.

II. UNCONSTITUTIONAL PUNITIVE DAMAGES PROCEDURES

The punishment here was, as respondent concedes, based upon a rule retroactively applied. When a retroactive punishment is imposed, its application is not governed by the rational basis standard, but by the Ex Post Facto Clause and the ex post facto component of the Due Process Clause.

The ex post facto rule governs punishments. The punitive damages verdict in this case was on a scale unprecedented and unannounced at the time of the transaction, and for behavior made punishable only after the fact. Hence, the ex post facto component of Due Process, and not the rational basis standard, is the controlling standard of constitutional review.

The requirement of notice is particularly crucial when the conduct upon which punishment is imposed involves the assertion in court of an argument as to a

legal right. The right to access the courts is an especially sensitive form of conduct, the exercise of which has been punished here by a retroactive legal standard. If ever ex post facto should apply, it is to retroactive punishment of constitutionally protected behavior, namely the assertion of a legal right.

Whereas *Browning-Ferris*,[3] which respondent seeks to distinguish, involved punishment for a decision of commercial strategy, the conduct punished here was the petitioner's demand for a judicial determination of liability under an insurance contract. As regards *Browning-Ferris*, the amount of the punishment here, it is true, was not as great. Nevertheless, it was $1.25 million. That is a substantial and heavy penalty, unless we are to say 'a million here, a million there, soon it will add up to real money.'

III. JUDICIAL DISQUALIFICATION

Unlike the cases cited by Respondent, Justice Embry knew of his disqualifying interest when he joined in the collegial deliberations which changed the law to his direct personal benefit.[4] That is different from a case in which a judge discovers his disqualifying interest only *after* the collegial decision has been handed down. The

---

[3] *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted*, December 5, 1988.

[4] The settlement value of Justice Embry's bad faith case was greatly enhanced when the upper limit of affirmed bad faith awards jumped from $100,000 to the $3.5 million and $1.25 million awards upheld in *Aetna Life Ins. Co. v. Lavoie* and this case, respectively.

necessity for disqualification of the other justices here is further necessitated by the fact that, upon Justice Embry's failure to recuse himself, the remaining justices unanimously denied petitioner's motion for his disqualification.[5]

IV. THE ABOLISHED AFFIRMANCE PENALTY

Contrary to respondent, where a state court upholds a judgment "vacated" by this Court, in direct contradiction of this Court's orders, that is not a trivial matter of

---

[5] Exemplifying the court's reaction to petitioner's motion for disqualification, the Chief Justice of the Alabama Supreme Court described the substantially identical motion of Aetna as a "serious charge impugning the honesty and integrity of the Alabama Supreme Court and its members." *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060, 1090 (1984). Under such circumstances a fully fair and unbiased rehearing by Justice Embry's fellow justices seems unrealistic. By requesting disqualification of the other justices who conferred and deliberated with Justice Embry, petitioner does not suggest that the court and its justices are lacking integrity, but simply that Justice Embry's influence had an ineradicable effect on the other justices' view of these facts in particular and the tort of bad faith in general.

state law. To rule otherwise is to say the states are not bound by orders of this Court.

Of Counsel:

GEOFFREY C. HAZARD, JR.
Sterling Professor of Law
Yale Law School
New Haven, Conn. 06520
Telephone: (203) 436-8253

*BERT S. NETTLES
FORREST S. LATTA
NETTLES, BARKER, JANECKY
& COPELAND, P.C.
3300 First Nat'l Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

Attorneys for Petitioner
Nationwide Mutual
Insurance Company

*Counsel of Record